Case No. 49605-4

IN THE COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

King County Superior Court Case No. 14-2-23546-1 SEA

P&M CONSTRUCTION, INC.,

APPELLANT,

v.

SEAN R. MATT and KIMBERLY M. TOSSMAN,

RESPONDENTS.

RESPONDENTS' BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Court Rules

I. INTRODUCTION

This appeal represents the continued disagreement by Appellant P&M Construction, Inc. ("P&M") with the Superior Court's award of attorney fees, in favor of Respondents Sean Matt and Kimberly Tossman ("the Matts"). The award of attorney fees was made after P&M ignored the Matts' repeated requests for entry of an Order of Dismissal by agreement—an agreement P&M offered only after the Matts filed a formal motion for entry of dismissal.

II. ASSIGNMENTS OF ERROR

Assignments of Error

The Matts do not assign error to decisions made by the Superior Court.

The Matts do disagree with P&M's Assignments of Error as the Superior Court's properly (1) considered their timely application for attorney fees, pursuant to CR 54(d)(2); (2) awarded attorney fees; (3) determined that the Matts' request for attorney fees was not frivolous; and (4) denied P&M's motion to reconsider the award of attorney fees.

Issues Pertaining to Assignments of Error

The Matts disagree with P&M's Issues Pertaining to Assignment of Error. The Matts believe that the Issues presented by this appeal are:

Whether the Superior Court's award of attorney fees was proper, given P&M's repeated failures to respond to communications from counsel (similar to its earlier failures to respond to communications from the Court) which unnecessarily increased the costs of litigation and the resources of the Superior Court?

Whether P&M's delay in stipulating to entry of an order of dismissal was justified, given that it eventually agreed to so after a formal motion to do so was filed?

Whether the Superior Court's award of attorney fees was discretionary?

Whether the standard of review for an award of attorney fees is "abuse of discretion"?

III. STATEMENT OF THE CASE

This is an appeal from three separate Orders of the King County Superior Court which collectively granted a motion to dismiss a case that the Parties had agreed to settle and awarded attorney fees in the amount of $2,236.[1]

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[1] The Orders—Order Granting Motion for Dismissal of All Claims and Awarding Attorney Fees (December 1, 2015), Order Denying Reconsider [sic] Award of Attorney Fees (January 7, 2016), and Order Awarding Attorney Fees (January 14, 2016), respectively—are attached to the Notice of Appeal. The year reflected on the latter, the Order Awarding Attorney Fees, is 2015. The correct year, of course, is 2016. For this appeal, this typographical error is without import.

The award of attorney fees, an exercise of the Superior Court's discretion, was based on the failure of P&M to respond to, or even acknowledge, repeated requests by the Matts for approval and entry of an Order of Dismissal by way of stipulation, rather than by motion. Given that P&M never responded to the requests, let alone disclose what reasons for delay it had (if any), the Matts sought dismissal by way of a formal motion. This act, however, was unnecessary, and unfairly increased the Matts' costs of litigation. As a consequence, the Superior Court determined that P&M, and not the Matts, should bear those unnecessary and increased costs.

IV. SUMMARY OF ARGUMENT

Although P&M's appeal is limited to its challenge of a discretionary award of attorney fees, much of Appellant's Brief wanders across (1) the claimed relevance of, and apparent, "Effect of Federal Banking Laws"; (2) an assertion that it was the victim of a "breakdown in the electronic delivery system", a "similar disruption" which P&M claimed occurred at least two years before the facts relevant to this action in 2013; and (4) a misguided reading of King County Superior Court's LCR 45(e)(2). As demonstrated in Respondents' Brief, these arguments are unavailing.

Rather, the record demonstrates that the Superior Court, after repeated examples of P&M's failures to comply with the Court Rules or to respond to inquiries and communications of the Matts (as well as those of the Court itself), exercised its discretion and ordered that the Matts should be reimbursed for attorney fees they incurred in securing relief which they were entitled to and which P&M likewise agreed to, but only after the Matts served and filed a formal motion seeking dismissal of the case these same Parties had settled only weeks before.

V. ARGUMENT

Introduction

This appeal arises from an action for damages filed by P&M, which had been hired to perform a remodel project at the Matts' residence. P&M began the project in October 2012 and left, before completing its work, in October 2013. After walking away from the uncompleted project, P&M filed a Notice of Claim of Lien, in December 2013, and its Complaint for Damages and Lien Foreclosure, in August 2014, CP 1-7. For reasons never explained or disclosed, P&M delayed serving the Matts until October 2014.

In December 2014, P&M's Lien was determined to be invalid as a matter of law and its Claim of Lien was dismissed. Trial of the remaining

claims, including those of the Matts based on P&M's inadequate or incomplete work, was scheduled to begin on October 19, 2015.

The case was re-assigned to a different Individual Calendar (IC) Judge on October 19, 2015, the same day as trial was scheduled to begin. Because of the transition, the Parties appeared in court on October 20, 2015, at which time they presented their arguments on the Matts' pre-trial motions—including their motion to exclude P&M's trial witnesses, CP 94-101[2], as P&M had failed to disclose them, timely or otherwise, as earlier ordered by the Court to do so. Although P&M has argued (and apparently continues to argue) that it was unaware that the Matts had filed and served their pre-trial motions regarding its failure to timely or properly disclose its trial witnesses, P&M has never been alleged that it was unaware of its obligations to disclose its trial witnesses.

P&M's claim that it had not responded to certain pre-trial motions because it had not received them was eerily similar to its lack of response to communications from the Court. As the oral arguments concerning certain pre-trial motions were beginning, the following exchange occurred:

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[2] This motion was styled Motion to Exclude Witnesses Plaintiff P&M Construction, Inc. May Call at Trial.

> THE COURT: On that topic [P&M's claim that it had not electronically received two motions filed by the Matts], Mr. Cline [counsel for P&M], did you receive some emails from the Court from my bailiff?
>
> MR. CLINE: Well, within the last 12 to 24 hours or so.
>
> THE COURT: *Because we—he tried to call you yesterday, and he tried to email you. And we hadn't heard back from you. I wasn't even sure you were coming today.* (emphasis added)

P&M attempted, apparently, to justify its unresponsiveness to the Court's inquiries, which were time sensitive, as based on the need to avoid "interruptions" so as to prepare for trial. Respondents' RP, at 3.

The morning of the following day (October 21, 2015), before jury selection began, the Parties agreed to settle their respective claims, the details of which were stated in open court and on the record. Appellant's RP, at 3-4. As part of the Parties' CR 2A Agreement, the Matts agreed to make a payment to P&M and the Parties "agreed to dismiss their claims against each other with prejudice."[3] Appellant's RP, at 3. Following the colloquy regarding the terms of the Parties' settlement agreement, the Superior Court emphasized that "the case won't be dismissed until I sign an order, and I won't sign an order until someone gives me one." Appellant's RP, at 4.

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[3] There were other specifics of the CR 2A Agreement, including future performance of remodel work to be performed by P&M, in order to satisfy the Matts' claims that portions of P&M's work was either inadequate or incomplete.

The Matts' payment was personally delivered to P&M's two principals the afternoon of that same day, as promised. CP 164-170, CP 171-172. Given that the Parties' disputes had been settled, the Matts were anxious to have the litigation promptly dismissed, particularly given that P&M had earlier (and unlawfully) filed a Lien against their property. So, even though part of the settlement agreement involved future performance by P&M, the Matts sent a proposed Stipulation and Order for Dismissal to P&M, by email, the same day they delivered their payment. CP 171-172.

Unfortunately, what followed over the next several weeks was more of the same—a complete lack of response from P&M, despite repeated requests, an experience not unlike that which P&M had only just exhibited with respect to communications from the Superior Court.

There was no response to the initial email request, so a second email was sent on October 26, 2015. CP 179. On the next day, when no response was received, an attempt was made to contact P&M's attorney by telephone, but to no avail.[4] Having received no response to these methods of inquiry, the Matts next tried the United States Post Office, by way of correspondence dated October 27, 2015. CP 181. Finally, on November 9, 2015, a fourth effort was made to contact P&M's attorney—this time,

[4] A message was left on the voicemail. CP 172.

the message included notice that a failure to respond would trigger a motion to dismiss and a request for attorney fees. CP 183. Even this effort failed to generate so much as the courtesy of a reply.[5]

Finally, but only after the Matts prepared and filed their Motion for Dismissal, With Prejudice, of All Claims of All Parties (CP 164-170), did P&M surface. And, when it did, P&M agreed that an Order of Dismissal, in the form proposed by the Matts, should be entered. CP 184-186. At the same (and for the first) time, however, P&M claimed that there were several reasons why it had refused to stipulate to a dismissal earlier. CP 185-186. Among the excuses for ignoring the Matts' earlier communications was the assertion that P&M's attorney "needed some well-deserved time off, having been overworked and sleep-deprived due to this case." CP 186.

Recognizing that (1) entry of an Order of Dismissal, with prejudice, was appropriate; (2) the cost of having an Order of Dismissal entered by motion, rather than stipulation, was more costly (as well as unnecessary); and (3) there was no legitimate reason for P&M's failure to respond to any of the Matts' informal communications, or to a dismissal by stipulation, the Superior Court granted the motion to dismiss, CP 164-

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[5] P&M has theatrically labeled the Matts' notice that they would seek fees if they had to file a formal motion as an "*in terrorem* demand." Appellant's

170, and awarded the Matts their reasonable attorney fees (in an amount to be later determined). CP 195-196. The award of attorney fees, and the later calculation of the amount, $2,236, were discretionary decisions.[6] CP 222-223. As such, the standard of review is "abuse of discretion." *Washington State Physicians, Ins. Exchange & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). This standard of review is a rigorous one. "A trial court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons." *Holbrook v. Weyerhaeuser Co.*, 118 Wn.2d 306, 315, 822 P.2d 271 (1992). Not surprisingly, P&M's appeal fails to make either of these showings.

Contrary to P&M's effort to rewrite history, the Superior Court's order awarding attorney fees was issued because P&M's failure to respond to, let alone cooperate with, a request for dismissal by agreement (which it did not oppose), caused the Matts to incur unnecessary, albeit reasonable, attorney fees. Entry of an Order of Dismissal, by stipulation, is, of course, standard practice—a lawsuit is settled and an Order of Dismissal is entered, by stipulation. The efforts of the Matts to proceed in this fashion,

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brief, at 13.

[6] P&M has not challenged the amount of the attorney fees awarded. As a consequence, the amount of the award is not at issue.

however, were completely ignored and frustrated by P&M's failures, or refusals, to respond to their efforts to accomplish this uncontroversial, but necessary, task. All efforts to contact P&M's attorney in order to arrange for a joint submission of a Stipulated Order of Dismissal—by email, by telephone, by United States Postal Service—were ignored.[7] Unable to secure compliance by agreement, the Matts had no alternative to the use of the more formal process of filing a motion, if they wanted certain and prompt dismissal.

Finally, after the Matts prepared and filed their motion, P&M formally responded. Perhaps most importantly, P&M agreed that the case should be dismissed. The remainder of P&M's Response was largely beside the point; inaccurate; and, at times, bewildering. Much like Appellant's Brief, even the most cursory review of the arguments P&M raised then demonstrated that an award of attorney fees was appropriate.

Now, on appeal, P&M has argued that its refusals to even respond to the Matts' informal, and repeated, requests for entry of an Order of Dismissal by agreement were justified because (1) of the effect of Federal Banking Laws"; (2) it had not received two pre-trial motions filed by the Matts, due to a "breakdown in the electronic delivery system"; (3) the

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[7] P&M's attorney did not have, or at least disclose, a facsimile number.

Matts' request for attorney fees was time barred; (4) LCR 41(e)(2) did not confer a right to dismissal in less than 45 days following the Parties' settlement agreement, nor did it obligate P&M to agree to do so; and (5) there was no provision for attorney fees in the Notice of Settlement of All Claims Against All Parties.

"Federal Banking Laws" Have No Effect on this Case

P&M claims that one of its "legitimate interests was to delay the final dismissal until after its own bank gave irrevocable credit for the settlement check." Appellant's Brief, at 9. In fact, the Matts delivered payment to P&M on October 21, 2015, the same day they agreed to settle, as promised; their check "cleared" and the funds were available on October 22, 2015, weeks before many of the Matts' requests and before they eventually filed their motion.

Given these factual circumstances, it is evident that "Federal Banking Laws", regardless of whether they have been accurately presented by P&M, have nothing to do with this case. There was no "extended hold", or the need for "irrevocable credit for the settlement check." The Matts' check was delivered immediately, deposited promptly, and cleared without incident—all before the Matts' motion to dismiss needed to be filed.

The Matts' Informal Requests for Dismissal Were Received

P&M has again raised the claimed "breakdown in the electronic delivery system" as an apparent justification for its refusals to respond to the Matts' informal requests that the litigation be dismissed by agreement. Regardless of the validity of this dubious assertion, it is irrelevant.

The "breakdown" alleged by P&M concerns the Matts' pre-trial motions, which were filed weeks before the case settled. P&M timely received the Matts' informal requests for dismissal by agreement—which were made in a variety of ways—before the Matts filed their motion. It was P&M's failure to even acknowledge, let alone respond to, the repeated requests that compelled the Matts to formally seek judicial relief, and was the basis of the award of attorney fees. The claimed "breakdown" involved events weeks before the Parties' agreed to settle their disputes, and before the Matts sought P&M's agreement to dismissal.

The Matts' Request for Attorney Fees Was Timely

Citing CR 54(d)(2), P&M claims that the Matts' request for attorney fees was time barred. This argument is in error.

CR 54(d)(2), of course, speaks to "claims" for attorney fees, and the Matts timely made their claim when they filed their motion for

dismissal.[8] The claim must be made by motion, which "must be filed no later than 10 days after entry of judgment." *Id.* Given that the Matts filed their motion for attorney fees before "entry of judgment", their motion was timely. CP 164-170.

P&M also claims that there was no legal basis for the Superior Court's award of attorney fees. It is well established, however, that courts have the inherent power to sanction attorneys for bad faith conduct in order to achieve an orderly and expeditious resolution of the litigation, and to deter future abuses. *Greenbank Beach and Boat Club, Inc. v. Bunney*, 168 Wn. App. 517, 525, 280 P.3d 1133 (2012) (citations omitted). Given the circumstances in this case, the Superior Court's exercise of its inherent power was proper.

P&M Has Misapprehended LCR 41(e)(2)

Following the Parties' announcement of their settlement agreement, the terms of which were declared in open court and on the record, they signed the Court's "Notice of Settlement of All Claims Against All Parties" ("Notice of Settlement), CP 162, a document P&M

[8] P&M's objection has conflated "claims" with "proof". The two are different. In this respect, the procedure for making the "claim" for and submitting "proof" of attorney fees is similar to RAP 18.1(d).

has re-characterized as the "Executory Accord", and has afforded it with a number of powers.[9]

Absent from P&M's discussion is that dismissal of the action, pursuant to the Notice of Settlement, appears to be discretionary ("the case *may* be dismissed on the Clerk's Motion pursuant to LCR 41(b)(2)(B) (emphasis added)).[10] The Notice of Settlement does not, at least by its own terms, mandate dismissal, automatically or otherwise. The Matts, just like virtually every other litigant, sought to have an Order of Dismissal entered—for certain and as timely as possible.

Moreover, P&M's argument that neither the settlement agreement nor the Notice of Settlement contained a provision for attorney fees ignores the fact that the Matts' request for attorney fees was based on the failure of P&M to respond to, let alone cooperate with, any effort to present the necessary and uncontested Order of Dismissal. The request for, and order to pay, attorney fees was based on P&M's pattern of

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[9] Contrary to P&M's urgings, there is no need to "interpret" the "Executory Accord" (*i.e.*, the Notice of Settlement), *de novo* or otherwise. Moreover, the contentions that there was no express "right to demand dismissal" less than 45 days after the assigned trial date or that it confers no obligation to agree to do so are beside the point. By signing the proposed Stipulation and Order of Dismissal (finally), P&M agreed to dismissal less than 45 days after the assigned trial date and the Court's Order of Dismissal was less than 45 after the assigned trial date.

behavior which unreasonably and unnecessarily increased the cost of litigation. The request for, and the order to pay, attorney fees was not based on language in the CR 2A or the Notice of Settlement.

Finally, it should be observed that the "reasons" why P&M had not signed the Stipulation and Order of Dismissal, at least before the motion was filed, are equally unavailing. Although the "reasons" are not persuasive and unavailing, more importantly, they were not communicated until after the motion was filed.

P&M's Request for Sanctions Should Be Denied

P&M's unsupported request for "sanctions" should be denied. *First*, P&M's request for "sanctions" was not made below and is being made for the first time in this appeal.[11] On that basis alone, the request must be denied. *Second*, P&M's request for "sanctions" ignores the fact that the Matts' motion for attorney fees was granted, a circumstance which moots the contention that the motion violated CR 11.

Instead, of course, this Court should award the Matts the attorney fees and costs they have incurred in having to respond to P&M's appeal

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[10] LCR 41(b)(2)(B), if invoked, appears to be non-discretionary ("the clerk *shall* notify the parties...the clerk *shall* enter an order of dismissal without prejudice."

[11] P&M's Motion for Reconsideration asserted that the Matts' request for attorney fees was "in the technical sense of that word—frivolous", a term it apparently meant to imply as "arbitrary". CP 198-215.

and, pursuant to RAP 18.1(a) and (b), the Matts request that this Court do so.

VI. CONCLUSION

It is respectfully requested that this Court affirm the Superior Court's award of $2,236 in attorney fees the Matts incurred in seeking necessary but uncontested relief only because P&M was wholly unresponsive to its obligations to have the requested relief granted by this Court and award them their reasonable attorney fees in responding to P&M's appeal.

DATED this 10th day of August, 2016.

SKELLENGER BENDER, P.S.

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CERTIFICATE OF SERVICE

On August 10, 2016, I filed Respondents' Brief with the Court of Appeals, Division 1, via hand delivery; and served a copy of Respondents' Brief by U.S. Mail and electronic mail to:

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